No. 17-778

IN THE

Supreme Court of the United States

JAMAR ALONZO QUARLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

INTRODUCTION AND SUMMARY OF ARGUMENT

At common law, burglary required an unlawful entry with intent to commit a crime. *See, e.g.*, 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13, at 464 (1986). That common law definition has been expanded in the context

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

of the Armed Career Criminal Act to include not only unlawful entry, but also unlawful "remaining." The critical question presented in this case is what effect the "remaining" language has on the definition of burglary. Does it "broaden the definition of criminal trespass," or does it "eliminate the requirement that the act constituting criminal trespass be accompanied by contemporaneous intent to commit a crime"? *People v. Gaines*, 546 N.E.2d 913, 915 (N.Y. 1989).

The statutory text and its evolution show that the "remaining" language was not intended to eviscerate the contemporaneous intent requirement. In the 1970s and 1980s, commentators recommended an important limitation on any expansion of burglary statutes to reach unlawful remaining after a lawful entry: that the remaining be done *surreptitiously*. Congress heeded this advice in the Armed Career Criminal Act of 1984. A *surreptitious* remaining embodies a contemporaneous intent requirement and belies the notion that Congress intended to dispose with that essential element of burglary in the Armed Career Criminal Act of 1986.

Even if the statutory text and legislative history were less than clear, the separation of powers principles underlying the rule of lenity militate against an expansive construction of an ambiguous criminal statute. That concern is particularly salient here given the deep roots of the contemporaneous intent requirement and the harsh consequences its abolition would impose for relatively minor conduct. Congress is required to speak much more explicitly before it can be viewed as making such a dramatic and consequential change to the criminal law.

ARGUMENT

I. Congress's Definition Of Burglary As Surreptitiously Remaining Embodies A Contemporaneous Intent Requirement.

In the 1970s and 1980s, commentators discussing proposals to expand burglary beyond unlawful entry recommended limiting that expansion to unlawful *surreptitious* remaining. Congress followed this recommendation in its criminal legislation in the 1980s. In the context the term was used by commentators and Congress, a surreptitious remaining embodies a contemporaneous intent requirement.

A. Pre-ACCA commentators recommended that burglary expand to only *surreptitious* remaining.

From the early 1970s through the 1980s, prominent bodies reviewing criminal law issues recommended legislative changes to the common law of burglary.

One of the first to do so was the National Commission on Reform of Federal Criminal law, established by Congress in 1966 to "make a full and complete review and study ... for the purpose of formulating and recommending to the Congress legislation which would improve the federal system of criminal justice." Pub. L. No. 89-801, § 3, 80 Stat. 1516, 1516 (1966). The Commission, which came to be known as the Brown Commission after its chairman, Hon. Edmund G. Brown, was comprised of

three senators, three members of the House of Representatives, three federal judges, and three other members appointed by the President. *Id.* § 2(a), 80 Stat. 1516; *see also* American Law Institute, Model Penal Code § 221.1, cmt. 3 at 71 (1980). After years of research, the Brown Commission released a two-volume set of working papers (totaling almost 1500 pages) and a lengthy final report (of more than 350 pages). *See* National Commission on Reform of Federal Criminal Laws, Working Papers (1970); National Commission on Reform of Federal Criminal Laws, Final Report (1971).

Part of this undertaking involved a detailed analysis of the crime of burglary. At the time, there was no generic federal burglary statute. Final Report § 1711, at 200. The Commission proposed one and discussed its scope, observing:

> [S]ome modern Codes limit burglary proscriptions only to intrusions accomplished by unlawful entry. That is, a person who properly enters into property but remains there past the time when he properly can be there, even with intent to commit a crime, is not considered to be a burglar.... Other modern Codes, however, include, as burglary, remaining on premises without privilege to do so and with intent to commit a crime (e.g. the New York Revised Penal Law § 140.00 (McKinney 1967), and the Illinois Criminal Code § 19-1 (1961)).

II Working Papers, *supra*, at 895.

The Commission noted that this "remaining" language would, for example, "be helpful in prosecuting burglaries of Federal office buildings where access is open during normal business hours but restricted to authorized personnel at other times." *Id.* But the Commission also had concerns that this language "may overly broaden the scope of the burglary statute":

> A visitor to one's home, for example, who becomes involved in an argument with his host, threatens to punch him in the nose, and is asked to leave, would no longer be privileged to remain on the premises; if he does not leave, but continues his threatening argument, he would, if simply 'remaining' without privilege is included in the proposed definition, be guilty of burglary.

Id. To avoid this result, the Commission recommended that the burglary provision it was proposing be "limited to acts of 'surreptitiously' remaining on premises." *Id.*

The Model Penal Code, revised in 1980 and drawing heavily on the Brown Commission's study, addressed this same development in burglary statutes: "language designed to deal with one who remains unlawfully on premises." *See* Model Penal Code § 221.1, cmt. 3 at 70. Like the Brown Commission, the Model Penal Code emphasized that there

were two potential benefits to such an expansion of the common law formulation. First, "lawful entry does not necessarily foreclose the kind of intrusion that burglary is designed to reach." *Id.* The Model Penal Code gave two examples—"a customer who hides in a bank until after closing hours and then undertakes his criminal activity" and "a guest invited to a home who hides in a closet and engages in criminal activity when the homeowner believes that all his guests have gone"—that would fall outside the scope a burglary statute limited to unprivileged entry. *Id.* Second, the Model Penal Code noted a practical problem of proof: In the absence of "evidence of forcible breaking," would-be burglars could argue that they "entered before closing time" and hence avoid criminal liability. *Id.*

In addition to these benefits, however, the Model Penal Code noted "a difficulty" with the "remaining" language "that should lead to its rejection." *Id.* at 71. Quoting from the Working Papers from the Brown Commission, the Model Penal Code noted that this language would encompass conduct that no one would consider to be burglary: a guest refusing to leave when asked and punching his host in the nose. *Id.* For all of these reasons, the Model Penal Code recommended that if burglary were to be expanded beyond unlawful entries, such expansion reach only unlawful *surreptitious* remaining.[2] *Id.*

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[2] The Model Penal Code did not itself include the "remaining" language in its definition of burglary, which was limited to entry with criminal intent, described as the "core" of common law burglary. Model Penal Code § 221.1 & cmt. 3 at 69.

B. Congress incorporated this recommendation in its 1980s legislation.

Congress's criminal legislation in the early 1980s followed the approach recommended by the Brown Commission and the Model Penal Code.

In connection with the proposed Criminal Code Reform Act of 1981, Congress recommended creating a federal burglary offense. S.1630, 97th Cong. § 1712 (1981); *see also* S. Rep. No. 97-307, at 649 (1981). In defining burglary and its lesser included offense of criminal trespass, Congress included one who "without privilege ... enters or remains *surreptitiously* within a dwelling that is the property of another." S.1630 §§ 1711, 1712 (emphasis added); *see also* S. Rep. No. 97-307, at 650, 655. In an accompanying committee report, Congress alluded to the Brown Commission and Model Penal Code's concern, albeit without citation, noting that "[t]he qualifying term 'surreptitiously' is used in order to prevent the statute from applying to the type of situation where an individual invited to one's home is subsequently asked to leave, but refuses and threatens to punch his host in the nose." S. Rep. No. 97-307, at 651 (footnotes omitted).

While the Criminal Code Reform Act of 1981 did not become law, Congress borrowed from it in enacting the Armed Career Criminal Act of 1984. A Senate committee report from an early version of the law explained that the statute's definition of burglary was "essentially the offense entitled 'criminal entry' from Section 1712 of the Criminal Code Reform Act." S. Rep. No. 98-190, at 20 (1983). The resulting

definition of burglary was "any felony consisting of entering or remaining *surreptitiously* within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." Pub. L. No. 98-473, ch. 18, 98 Stat. 1837, 2185, 18 U.S.C. App. § 1202(c)(9) (1982 ed., Supp. III) (emphasis added).

Congress did not include a definition of burglary in the Armed Career Criminal Act of 1986 (ACCA).[3] As this Court observed in *Taylor v. United States*, this "may have been an inadvertent casualty of a complex drafting process" and did not suggest "that Congress intended in 1986 to replace the 1984 ... definition of burglary with something entirely different." 495 U.S. 575, 589-90, (1990). For that reason, the Court in *Taylor* emphasized, the generic definition of burglary "is practically identical to the 1984 definition," in part because "there simply [wa]s no plausible alternative that Congress could have had in mind." *Id.* at 598. Indeed, a leading treatise published the same year Congress enacted ACCA again recommended "limit[ing] the remaining-within alternative to where that conduct is done surreptitiously." 2 LaFave & Scott, *supra*, § 8.13, at 468.

Generic burglary as Congress used the term in 1986, then, is properly seen as requiring not just any unlawful remaining, but an unlawful *surreptitious* remaining.

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[3] To avoid confusion, this brief will use the acronym ACCA to refer only to the Armed Career Criminal Act of 1986 and will refer to the Armed Career Criminal Act of 1984 using its complete title.

C. A surreptitious remaining necessarily embodies a contemporaneous intent requirement.

To act surreptitiously is to act clandestinely, secretly, or by stealth. *E.g.*, Oxford English Dictionary (2d ed. 1989), https://tinyurl.com/oed-surreptitious. Both the Model Penal Code and LaFave & Scott described surreptitious remaining with examples of *hiding*—in a bank or a closet in particular. Model Penal Code § 221, cmt. 3 at 71; 2 LaFave & Scott, *supra*, § 8.13(b), at 468. The person surreptitiously remaining must have had the intent to commit a future crime at the moment he first hid; there would be no reason to hide otherwise. By its very nature, then, "surreptitious remaining" refers to lying in wait after a lawful entry to commit some later crime and consequently incorporates a contemporaneous intent requirement.[4]

That fact is further evidenced by the way courts reading the contemporaneous intent requirement out of generic burglary have also eviscerated the requirement that a remaining be surreptitious. A common refrain by opponents of the contemporaneous intent requirement is that "someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building or structure to do so."

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[4] The concept of surreptitious remaining is a *limitation* on the contemporaneous intent principle. Thus, there can be contemporaneous intent to commit a crime without surreptitious remaining, and such conduct—like punching a host in the nose after being asked to leave—is not burglary.

United States v. Priddy, 808 F.3d 676, 685 (6th Cir. 2015). But such a person will not necessarily have remained *surreptitiously* on the premises to do so. The classic example is one that the Model Penal Code, LaFave & Scott, and Congress have all described as outside the bounds of burglary: A guest who begins threatening his host, refuses to leave when asked, and then punches his host in the nose. Other illustrations of the same ilk include a homeless person who breaks into an office during a snowstorm and stays near the heating vents to keep warm but who later steals something, *Gaines*, 546 N.E.2d at 914, and "teenagers who unlawfully enter a house ... to party, and only later decide to commit a crime," *United States v. Herrera-Montes*, 490 F.3d 390, 392 (5th Cir. 2007). These scenarios do not involve remaining *surreptitiously* on the premises but instead open trespass.

These examples illustrate that elimination of the contemporaneous intent requirement sweeps in conduct that Congress deliberately sought to exclude from the bounds of burglary. Take, for example, *State v. Herron*, 70 So. 3d 705 (Fla. Dist. Ct. App. 2011). A man climbed up the balcony of the home of his ex-girlfriend, who let him in. *Id.* at 706-07. He "told her he needed a place to sleep because his parents had kicked him out." *Id.* at 707. She asked him to leave, but he refused. *Id.* Suspecting that she had a new boyfriend, he went to the bedroom, opened the closet, and found a man hiding inside. *Id.* The two men fought, and the ex-girlfriend was injured while trying to break up the fight. *Id.* Although the Florida court conceded that the man lacked intent to commit a crime at the time when he entered or first re-

mained, the Florida court found this to be a burglary on the theory that intent to commit a crime can be formulated at any time during a trespass. *Id.*; *see also State v. Gutierrez*, 172 P.3d 18, 23 (Kan. 2007) ("Once she told him to leave ... his presence was unauthorized even if previously permitted. Evidence of development of defendant's intent to commit a felony at any point [thereafter] was legally sufficient to support the aggravated burglary conviction."). While the surreptitious remaining requirement was meant to exclude precisely this kind of scenario, which is strikingly similar to the hypothetical guest punching his host in the nose, the Sixth Circuit's decision would sweep it back in.

In sum, a contemporaneous intent requirement is inherent in the requirement that a remaining be surreptitious. By adding a surreptitious remaining alternative to unlawful entry, then, "the Legislature sought to broaden the definition of criminal trespass, not to eliminate the requirement that the act constituting criminal trespass be accompanied by contemporaneous intent to commit a crime." *Gaines*, 546 N.E.2d at 915. Under this view, an unlawful remaining is not a continuous period of trespass during which intent to commit a crime may be formed at any point. Instead, the phrase refers to the point in time at which point a burglar who entered premises lawfully hides himself with the intent to commit some future crime.

II. Eliminating Burglary's Contemporaneous Intent Requirement Would Violate The Principles Of Due Process And Separation Of Powers Underlying The Rule Of Lenity.

"Even if the language and history of [ACCA] were less clear" than set forth above, *see also* Pet. Br. 15-28, it "could not properly be expanded as the Government suggests ... [because] this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity." *United States v. Enmons*, 410 U.S. 396, 411 (1973).

A. Absent a clear expression of Congressional intent, the choice between interpretations of a criminal statute is governed by the rule of lenity.

The "remaining" language can be viewed in one of two ways. On the first view, "remaining" is an alternative to unlawful entry and, like entry, refers to the particular moment in time when the would-be burglar becomes a trespasser. Viewed through this lens, it "broaden[s] the definition of criminal trespass" but does "not ... eliminate the requirement that the act constituting criminal trespass be accompanied by contemporaneous intent to commit a crime." *Gaines*, 546 N.E.2d at 915; *see also State v. Mahoe*, 972 P.2d 287, 291 (Haw. 1998) ("It would be an unwarranted extension of Hawai'i's modern burglary statute to expand the offense of burglary to include situations in which the criminal intent develops after an unlawful entry or remaining has occurred."). On the second view, "remaining" is a continuous period that lasts for the duration of a

trespass. Viewed through that lens, any crime committed while someone is trespassing is a burglary because such a person "will necessarily have remained inside the building or structure to do so." *Priddy*, 808 F.3d at 685; *see also State v. Dible*, 538 N.W.2d 267, 271 (Iowa 1995) (because "the statute contemplates the decision [to remain] as a continuous event, beginning when a defendant determines to unlawfully remain on the premises and ending when the defendant leaves the premises," "[i]f, at any point on this continuum, a defendant forms the intent to remain on the premises with the intent to commit an assault or theft, at that point, the defendant commits burglary").

Under the rule of lenity, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [courts] choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347-48 (1971) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)).

This rule has two constitutional underpinnings. First, it "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *United States v. Santos*, 553 U.S. 507, 514 (2008) (Scalia, J.) (plurality) (citations omitted); *see also Bass*, 404 U.S. at 348. "[E]qually important, it vindicates the principle that only the legislature may define crimes and fix punishments." *Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (Scalia, J.,

respecting denial of certiorari); *see also Bass*, 404 U.S. at 348 ("[L]egislatures and not courts should define criminal activity."). Together, these two principles dictate that Congress "may not abdicate [its] responsibilities for setting the standards of the criminal law by leaving to judges the power to decide the various crimes includable in [a] vague phrase." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1227 (2018) (Gorsuch, J., concurring) (internal quotation marks and citations omitted)).

In sum, the rule of lenity recognizes that courts "do not play the part of a mindreader" and should "reject[] the impulse to speculate regarding a dubious congressional intent." *Santos*, 553 U.S. at 515 (Scalia, J.). Here, the lenity precept and its underlying rationales compel rejection of the Sixth Circuit's approach.

B. There is insufficient evidence of Congressional intent to eliminate the contemporaneous intent requirement to justify that dramatic change in the definition of burglary.

The crux of burglary has long been the intent to commit a crime at the time of entry. When commentators, legislatures, and courts began proposing the "remaining" alternative, it was presented as modifying the entry requirement, not the intent requirement. In the absence of clear evidence that Congress viewed it differently, the rule of lenity forbids interpreting the "remaining" language to eliminate the contemporaneous intent requirement.

1. Contemporaneous intent at entry has long been a defining characteristic of burglary.

As the Model Penal Code explained, the offense of burglary "probably resulted from an effort to compensate for defects of the traditional law of attempt." Model Penal Code § 221.1, cmt. 1 at 62-63. By "[m]aking entry with criminal intent an independent substantive offense," burglary "moved back the moment when the law could intervene in a criminal design." *Id.* at 63. Viewing burglary as an attempt workaround, it is clear that the intent to commit some future crime at the time of the trespass was the gravamen of the offense. *See also* Pet. Br. 12, 18-22.

This central aspect of the offense of burglary remained in place in the United States well into the 1970s and 1980s. The Brown Commission, for example, emphasized that entry with intent to commit a crime "displays a degree of deliberation and commitment to criminal action on the part of the culprit." II Working Papers, *supra*, at 892. And the Model Penal Code described "the objective or purpose that accompanies the entry" as one of the key elements of the offense. Model Penal Code § 221.1, cmt. 3 at 68.

As the D.C. Court of Appeals explained at the time, "[a] requisite element of proof in a prosecution under our burglary statute, *and those of most jurisdictions*, is that the defendant have an intent to steal or commit a crime at the time of entry." *Massey v. United States*, 320 A.2d 296, 299 (D.C. 1974) (em-

phasis added, citations omitted); *see also e.g., Commonwealth v. Tingle*, 419 A.2d 6, 9 (Pa. Super Ct. 1980); *Timmons v. State*, 500 N.E.2d 1212, 1215-16 (Ind. 1986).

2. "Remaining" was seen as modifying the entry element, not the intent element.

Commentators, legislatures, and courts discussing the "remaining" language in the 1970s and 1980s largely described it as an alternative form of trespass to satisfy what was historically the unlawful entry requirement, not as a way to eliminate the requirement of criminal intent at the time of trespass.

The Model Penal Code, for example, separated its discussion of burglary into four elements: "the nature of the entry, the place of entry, the objective or purpose that accompanies the entry, and a description of factors accompanying the entry that aggravate the degree of the offense." Model Penal Code § 221.1, cmt. 3 at 68. The "remaining" language was discussed as part of the first element, *id.* at 69-71, not the third element, *id.* at 75-78. And in a notable shift away from entry-centric language, the Model Penal Code's discussion of "criminal purpose" (i.e. intent) referred to criminal intent at the time of the "intrusion." *Id.* at 75. Similarly, the Brown Commission described the "remaining" alternative in a paragraph on whether burglary should be limited to unlawful entries or not. II Working Papers, *supra*, at 895. And LaFave & Scott explained that the "remaining" language was desirable because "[a] lawful entry does not foreclose the kind of intrusion burgla-

ry is designed to reach." 2 LaFave & Scott, *supra*, § 8.13(b), at 468.

Early state adopters of the "remaining" language described it in a similar fashion as an alternative to unlawful entry. For example, New York's highest court explained that "[t]he word 'remain' in the phrase 'enter or remain' is designed to be applicable to cases in which a person enters with 'license or privilege' but remains on the premises after the termination of such license or privilege." *People v. Licata*, 268 N.E.2d 787, 789 (N.Y. 1971). Illinois courts of appeals described their burglary statute in the same way. *See, e.g., People v. Tinkler*, 407 N.E.2d 985, 987 (Ill. App. Ct. 1980) (observing that remaining language "is aimed at a situation where a defendant lawfully enters a building and then conceals himself with the intent to commit a felony").

The same theme is apparent from Congressional reports. With respect to the Criminal Code Reform Act of 1981, which formed the basis for the definition of burglary in the Armed Career Criminal Act of 1984, entry and surreptitious remaining were described as bearing on the second element of burglary, traditionally that of entry. S. Rep. No. 97-307, at 650-51. Intent to commit a crime was a separate element, discussed in detail several paragraphs later. *Id.* at 652.

In sum, contemporaneous evidence shows that the "remaining" language was predominantly viewed in the 1980s as "broaden[ing] the definition of criminal trespass" to include unlawful remaining after a lawful entry, not as "eliminat[ing] the requirement

that the act constituting criminal trespass be accompanied by contemporaneous intent to commit a crime." *Gaines*, 546 N.E.2d at 915.

3. Congress did not suggest an intent to deviate from this consensus.

There is no evidence that Congress, in enacting ACCA, intended to eliminate the contemporaneous intent requirement rather than simply to expand the kind of criminal trespass giving rise to liability as burglary.

Elsewhere, where Congress intended to deviate from the common law definition of burglary, it expressly noted as much. *E.g.*, S. Rep. No. 98-190, at 20 ("[T]he common law definition of burglary includes a requirement that the offense be committed during the nighttime and with respect to a dwelling. However, for purposes of this Act, such limitations are not appropriate."). To be sure, Congress noted that its definition "expand[ed] the common law definition to include persons who remain surreptitiously within a dwelling," rather than limiting its reach to those whose entry was unlawful. S. Rep. No. 97-307, at 651. But Congress said nothing about understanding the "remaining" language to eliminate the requirement of contemporaneous intent at the time of the trespass and transform any crime committed while trespassing into a burglary. To the contrary, it took pains to make clear that *not* all crimes committed while trespassing were to be considered burglaries. *Id.* (one who is asked to leave, refuses, and threatens to punch his host in the nose has not committed burglary).

Nor was Congress "acting against [a] backdrop" where the dominant interpretation of the "remaining" language was to eliminate the contemporaneous intent requirement. *See Santos*, 553 U.S. at 513 (Scalia, J.). It appears that as of 1986, not a single state high court had construed the "remaining" language to have this effect. Pet. Br. 46-49.[5] By contrast, at least two state high courts had expressly rejected the notion that any crime committed while trespassing constituted burglary under their statutes' "remaining" language. *See id.* 31-32 (citing cases from Arkansas and Connecticut). And 21 states still limited burglary to unlawful entry with no "remaining" alternative *at all*. Pet. Br. 30-46 (citing statutes and cases from the District of Columbia, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and West Virginia).

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[5] While the Court of Criminal Appeals is the highest court for criminal matters in Texas, the language of Texas's burglary statute construed in *Day v. State*, 532 S.W.2d 302 (Tex. Crim. App. 1976) is unique. That provision had (and still has) three prongs: (1) unlawful entry with intent to commit a crime; (2) "remain[ing] concealed" unlawfully with intent to commit a crime; and (3) unlawful entry *followed by* commission of a crime. *See id.* at 305; *see also* Tex. Penal Code Ann. § 30.02(a) (West 1974). Subsection (3) clearly eliminates the contemporaneous intent requirement, but not through "remaining" language; *Day* had no occasion to consider the effect of that language.

From this, it is apparent that eliminating the contemporaneous intent element from burglary would have been bucking the trend dramatically. There is no indication that Congress intended to do so. Under the rule of lenity, "it would require statutory language much more explicit than that [present here] to lead to the conclusion that Congress intended" to eliminate such a deep-rooted and longstanding feature of the criminal law. *Williams v. United States*, 458 U.S. 279, 290 (1982) (quoting *Enmons*, 410 U.S. at 411).

C. Eliminating the contemporaneous intent requirement would lead to unjustified and draconian results.

The protections of the rule of lenity are all the more important here because of the dramatic consequences of an expansive interpretation of ACCA's predicate crimes. ACCA imposes a harsh 15-year mandatory minimum sentence on those convicted of being a felon in possession of a firearm with three or more prior convictions for enumerated offenses, including burglary. *See* 18 U.S.C. § 924(e)(1); *Taylor*, 495 U.S. at 581. Without a contemporaneous intent requirement, ACCA would make any crime committed while trespassing a predicate offense triggering a 15-year mandatory minimum.

Petitioner and the Courts of Appeals have given examples of the kinds of conduct this could sweep up: a homeless person seeking shelter from the cold who later takes food or a coat from inside a building; teenagers who break into a house to party but later decide to steal something from the house; a lost hik-

er who breaks into a cabin to keep warm and later takes food. Pet. Br. 55; *Herrera-Montes*, 490 F.3d at 392. These are not far-fetched hypotheticals; the reality is that defendants are prosecuted for burglary in similar circumstances in states that have dispensed with the contemporaneous intent requirement. *See, e.g., In re A.C.D.*, No. CA2014-06-085, 2015 WL 307842, at *1 (Ohio Ct. App. Jan. 26, 2015) (teenager prosecuted for juvenile equivalent of burglary after entering a house to see if it was the location of a planned party and eating snacks from the pantry); *State v. Walsh*, 789 P.2d 766, 767 (Wash. Ct. App. 1990) (teenager prosecuted for burglary for taking $10 and a coin collection from his mother's house after breaking in to take a shower and change his clothes[6]); *Evans v. State*, 653 S.E.2d 503, 504-06 (Ga. Ct. App. 2007), *rev'd on other grounds*, 673 S.E.2d 243 (Ga. 2009) (defendant prosecuted for burglary for stealing trinkets from an unoccupied house after seeking shelter there with his wife when their car broke down in the cold). Similarly, in states without a contemporaneous intent requirement, burglary prosecutions can arise from the kind of disputes between hosts and their guests that Congress deliberately intended to keep outside the bounds of burglary. *See supra* at 7-11. Under the Government's interpretation of ACCA, all of this conduct could

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[6] The teenager's conviction was subsequently reversed for reasons having nothing to do with contemporaneous intent: The Washington Supreme Court held that his mother violated her statutory obligation to provide for her minor child by kicking him out, rendering his later presence in the home lawful. *State v. Howe*, 805 P.2d 806 (Wash. 1991).

qualify as a predicate offense triggering a 15-year mandatory minimum sentence.

There is simply no justification for such draconian results. In the modern era, maintaining an independent burglary prohibition remains warranted because intrusion with an intent to commit a crime poses a risk above and beyond mere commission of the substantive offense. *See, e.g.*, S. Rep. No. 97-307, at 649. The "deliberation and commitment to criminal action" associated with burglary, II Working Papers, *supra*, at 892, is the same factor that motivated Congress to include burglary in its legislation targeting dangerous *career criminals* in the first place. Pet. Br. 51-54. Punishing mere crimes of opportunity committed while trespassing does not vindicate that interest and there is no reason or basis to stretch the statutory text to do so.

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At bottom, this Court must decide whether the "remaining" language is intended to "broaden the definition of criminal trespass" to include unlawful remaining after a lawful entry, or instead to "eliminate the requirement that the act constituting criminal trespass be accompanied by contemporaneous intent to commit a crime." *Gaines*, 546 N.E.2d at 915. Jettisoning what has always been a key feature of burglary—possession of contemporaneous intent to commit a crime at the time of trespass—based on Congressional silence and ambiguous language would disregard the history of the offense, violate the rule of lenity and its underlying purposes, and impose harsh results. There is nothing to suggest

that Congress intended such a break from the common understanding of burglary; in fact, the evidence is all to the contrary. This Court should not give such expansive meaning to a statutory term that need not be read in that way.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

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